No. 10-508

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM COZZI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A circuit split over the scope of the prohibition against derivative use of immunized statements has festered in the lower courts for decades. In its opposition brief, the government does not dispute the existence of the split, but principally maintains that the facts of this case weigh against this Court's review. Notwithstanding the government's attempt to characterize the underlying facts as "atypical," the resulting legal issue arises anytime non-courtroom use of immunized statements arises, as in this case. Moreover, the facts of this case do not detract from *why* review is necessary, nor do they impede this Court's ability to formulate and apply a *legal* standard. It is high time to resolve the well defined diversion of authority, and provide lower courts with much needed guidance concerning the scope of the prohibition against derivative use of immunized statements.

I. This Case Presents An Appropriate Vehicle To Resolve The Long Standing Circuit Split Concerning The Scope Of Prohibited Derivative Use Of Immunized Statements

The Question Presented as framed by the government is misleading. The government dismisses Jody Weis, the incoming head of the Chicago Police Department and a former high ranking FBI agent at the time in question, as a mere "third party." Gov.Opp. (I). Superintendent Weis, however, was no mere uninfluential bystander in the events culminating in petitioner's federal prosecution. Not discussed

by the government is the Seventh Circuit's conclusion that "Weis's standing as a former FBI agent and as the incoming head of the Chicago Police Department most likely weighed heavily in the FBI's decision to start an investigation." Pet.App. 14.

The government also minimizes what Weis did in focusing a federal prosecutorial lens on petitioner. While conceding that Weis "read petitioner's immunized statements," Gov.Opp. (I), the government says that Weis merely asked whether federal investigators had initiated an investigation, but did not disclose anything from the statements. It is undisputed, however, that the government "did not see fit to submit an affidavit from Weis," Pet.App. 10, in the district court. Nor did the government disclose Weis' actual e-mails. Furthermore, a hearsay report about one of the e-mails stated that Weis had declared that petitioner had "falsified his statement." Pet.App. 4.

All of this shows that the government did not discharge its burden of establishing that no derivative use of petitioner's immunized statements occurred. When all the pieces are inserted into the puzzle, petitioner's Question Presented is more accurate, and evinces the appropriateness of this Court's review.

The basic facts and general legal principles are not in dispute. This case does not present material differences between the Statements of the Case composed by petitioner and the government. The government readily admits that OPS investigators

interviewed petitioner on three occasions in September 2005, and "compelled him to make a statement or lose his job, but . . . guaranteed that his statements could not be used against him in any future criminal proceedings." Gov.Opp. 2. The government also does dispute the proposition that the scope of the immunity afforded by *Garrity v. New Jersey*, 385 U.S. 493 (1967), is equivalent to that articulated in *Kastigar v. United States*, 406 U.S. 441 (1972). See Gov.Opp. 6-7.

In his certiorari petition, petitioner documented a well entrenched circuit split. The government does not dispute the existence of fractured authority over the scope of permissible non-evidentiary use of immunized statements. *E.g.*, Gov.Opp. 7 (courts of appeal have analyzed the issue "in somewhat different ways"). The government, however, maintains that this case does not "implicate" the circuit split because this case "involves only third-party knowledge of immunized statements, not knowledge of anyone on the prosecution team." Gov.Opp. 6.

The government overlooks Weis' role and status. As one Seventh Circuit Judge noted at oral argument, it was not as if Weis was a "next door neighbor." http://www.ca7.uscourts.gov/tmp/4N0XGNF2.mp3. To the contrary, he was the appointed head of the Chicago Police Department. As such, he supervised the police department division responsible for investigating and prosecuting allegations of officer misconduct. The government's position that Weis was a mere "third party" is legally misguided. This Court's cases and basic agency principles dictate that the OPS

investigators' actions in compelling petitioner's immunized statements are imputed to Weis. Cf. *United States v. Hensley*, 469 U.S. 221, 232-33 (1985) (collective knowledge of law enforcement is what counts for Fourth Amendment purposes); see also *Giglio v. United States*, 405 U.S. 150, 152-54 (1972).

The government argues that petitioner has overlooked Weis' failure to impart to the FBI the contents of petitioner immunized statements. Gov.Opp. 12. This argument is peculiar. It is undisputed that the government has the burden when immunized statements are at issue. Yet, it was the government that has failed to disclose Weis' actual e-mails, or offer an affidavit from Weis.

The government's further reliance on the absence of a statement that Weis had read petitioner's immunized statements, Gov.Opp. 13, is similarly off-base. The government deliberately chose not to file a statement from Weis. That tactic cannot now be used against petitioner. Cf. *United States v. North*, 920 F.2d 940, 943 (D.C. Cir. 1990) ("the prosecutor has to *prove* that witnesses who testified against the defendant did not draw upon the immunized testimony to use it against the defendant; the burden of disproving use cannot, under *Kastigar,* be shifted onto the defendant, nor can the defendant be required to assume the burden of going forward with evidence that puts in issue the question of use") (emphasis original). The government's position also contravenes factual findings made by the district court and Seventh Circuit. Both courts presumed Weis had read

petitioner's statements. As noted, the Seventh Circuit went as far as to conclude that Weis' status as a former FBI agent and police department head "most likely weighed heavily in the FBI's decision to start an investigation" of petitioner. Pet.App. 14. Even if the Seventh Circuit had not reached this conclusion, the collective knowledge of OPS investigators is imputed to Weis as a matter of law.

In extracting and reading petitioner's OPS statements, Weis undoubtedly *used* them – and use of immunized statements is what is proscribed by cases such as *Kastigar v. United States*, 406 U.S. 441 (1972), and *United States v. Hubbell*, 530 U.S. 27 (2000). The government attempts to avoid the implications of this by arguing that Weis was not part of the federal "prosecution team." Gov.Opp. 10. It also points to the Seventh Circuit's pronouncement that petitioner's statements could not have had tangential influence on the federal prosecutors who handled petitioner's case because the chain of evidence between Weis and federal investigator's was "cut-off." Gov.Opp. 8-9. The government's position is circular and misses the crux of the issue. The government does not come to terms with *Kastigar's* admittedly "sweeping proscription." 406 U.S. at 460. That is, the government does not address *Kastigar's* complete ban on "the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* Thus, whether one is personally a member of the "prosecution team" is a distinction without a difference. "Prosecution team" membership

is not the applicable test. Indeed, *Kastigar* found the subjective good faith of individual prosecutors not to be the relevant test. *Id.* Reliance on objective tests in the criminal law arena is unremarkable. See, *e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). The government offers no good answer for petitioner's points, and unconvincingly advocates a subjective test, depending Weis' non-membership on the "prosecution team."[1]

Throughout this litigation, petitioner has called upon the government to declare that it would have prosecuted him in the absence of Weis' urging. *E.g.*, Pet. 12. At no point has the government made such a representation. Its opposition to the certiorari petition is no different. The only available objective conclusion based on this record is that, but for Weis' use of petitioner's immunized statements, petitioner would not have been prosecuted in federal court.

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[1] What does "prosecution team" mean anyway? Say a football team's talent scout identifies draft choices, who are later selected by the team's general manager at the draft. Neither the scout nor the general manager play in games. Nevertheless, one could not conclude that they are not integral parts of the organization comprising the football team. The same is true here. Exposed to, and influenced by, petitioner's immunized statements, Weis selected petitioner as a candidate for federal prosecution, albeit Weis did personally serve as the prosecution's case agent.

The government claims that petitioner's position comes "perilously close" to seeking transactional immunity. Gov.Opp. 13. Putting the rhetoric aside, this is not so. Petitioner's focus, if you will, has always been on whether Weis made derivative *use* of his immunized statements. *Kastigar* itself described the prosecution's burden as "heavy," 406 U.S. at 461-62; and it has been recognized as a burden that practically is difficult to meet. See *North*, 920 F.2d at 951-52 (Wald, C.J., dissenting); see also *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) ("the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by *Kastigar*"). And that is what happened here when Weis used petitioner's statements to propel the federal government to prosecute petitioner. See *United States v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992) ("It is not legitimate for the government to alter its investigatory strategy as a result of the immunized statement.").

In his certiorari petition, petitioner asserted that Weis, a state official, had "used petitioner's immunized statements to hand over petitioner on a silver platter for federal prosecution." Pet. 28-29; see generally *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964). Notably absent from the government's opposition is any response to this argument. The government's silence constitutes a waiver. See S. Ct. R. 15.2 (any non-jurisdictional objection to consideration of a question presented based on what occurred in the proceedings below "may be deemed

waived unless called to the Court's attention in the brief in opposition"); see also *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009) (failure to dispute an assertion in the brief in opposition "alone is reason to accept this as fact for purposes of our decision in this case"); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (requiring non-jurisdictional arguments against a grant of certiorari to be raised "*no later* than in respondent's brief in opposition to the petition for certiorari").

The government complains that this case "makes a poor vehicle for review" because "the record does not contain petitioner's immunized statements themselves." Gov.Opp. 13. The government is incorrect. Petitioner's statements were part of the district court record. It was the government that moved (in the direct appeal) to return petitioner's statements to the district court so there would be no exposure to them. *United States v. Cozzi*, No. 09-2648, Docket Entry #15 (7th Cir.). That the statements are housed in the district court does not mean they are not in the record, or unavailable. See S. Ct. R. 12.7 ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court."); S. Ct. R. 16.2 ("If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it.") Further, after portions of the record were unsealed (following the filing of petitioner's opening brief in the Seventh Circuit), petitioner pointed out that the OPS file in

the record "contained references to his statements." Pet.App. 9. So in this sense also petitioner's statements are in the record (and were available to the prosecutors). See Pet. 7.

The government argues that this Court's review is unwarranted because the facts are "atypical." Gov.Opp. 14. This is a red herring, and not a reason to deny review. Lower court confusion over the scope of *Kastigar's* prohibition has arisen in the face of non-courtroom use of immunized statements. Courts have dealt with such situations in a variety of ways, *e.g.*, treating statement use as an evidentiary use, *United States v. North*, 910 F.2d 843, 857-60 (D.C. Cir. 1990), *modified on reh'g*, 920 F.2d 940 (*per curiam*); employing a wide prohibition on non-evidentiary use, *McDaniel*, 482 F.2d at 311; or condoning statement use on the basis of a "tangential influence" doctrine, *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992). The perceived absence of a definition of "derivative use" from this Court has engendered the conflict. See *United States v. Montoya*, 45 F.3d 1286, 1295 (9th Cir. 1995) ("*Kastigar* did not expressly discuss the propriety of non-evidentiary use."). Irrespective of the government's characterization of the facts, the need for definition is a legal point, appropriately suited for resolution in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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